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IN THE

Supreme Court of the United States

JAMES R. TURCOTTE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the Controlled Substance Analogue Act, whether the complete failure to instruct the jury that the offense requires the defendant to be aware that the substance is an analogue of a controlled substance, an element of the offense, can constitute harmless error, even though the element was vigorously contested at trial.

2. Whether, instead of allowing the jury to decide whether the defendant knew that the substance was an analogue of a controlled substance (as required by the Act), the court's application of a conclusive and irrebuttable presumption that the defendant possessed such knowledge, based upon the existence of Congressional pronouncements to that effect, equates to a directed verdict of that element of the offense, in violation of the Fifth and Sixth Amendments.

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PETITION FOR A WRIT OF CERTIORARI

Mr. Turcotte respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit. Certiorari is appropriate because the panel's decision conflicts with decisions of at least three sister circuits, s*ee Powell v. Galaza*, 328 F.3d 558 (9th Cir. 2003), *United States v. Prigmore*, 243 F.3d 1 (1st Cir. 2001), and *United States v. Brown*, 202 F.3d 691 (4th Cir. 2000), which held that the omission from jury instructions of a genuinely contested element of an offense cannot be harmless, which is a principle supported by *dicta* in *Neder v. United States*, 527 U.S. 1 (1999). The Seventh Circuit created a discernable split in the Circuits by ruling that the district court's instruction for the jury to "forego" considering Mr. Turcotte's knowledge relating to whether the substance was an analogue was harmless, even though the facts relating to that element were vigorously contested at trial.

In addition, this case raises an important question of federal law relating to a defendant's due process rights and right to a jury trial under the Fifth and Sixth Amendments. Specifically, the Seventh Circuit's application of a conclusive presumption to satisfy an element of the offense—whether the defendant knew that the substance he possessed was a controlled substance analogue—without requiring the Government to prove that element beyond a reasonable doubt, implicates due process rights and the right to have a jury decide each contested element of the offense.

OPINION BELOW

The opinion of the court of appeals below was published and is reported as *United States v. Turcotte*, 405 F.3d 515 (7th

Cir. 2005). The decision is reprinted in the attached Appendix. (App. 1a-36a).[1]

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 19, 2005. On May 27, 2005, Mr. Turcotte timely filed a petition for rehearing *en banc*. The Seventh Circuit initially denied this request on June 8, 2005. Subsequently, on June 14, 2005, the court issued an amended order denying the request for a rehearing. This petition is filed within 90 days of that date. Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS AND STATUTES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. amend. V (2005).

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been commit-

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[1] The record on appeal consists of: two volumes of pleadings, two volumes of transcripts, and one in camera envelope from the district court proceedings; one supplemental record containing seven volumes of transcripts; one supplemental record containing two in camera envelopes; one supplemental record containing one volume of pleadings and three boxes of exhibits; one supplemental record containing two volumes of transcripts; and one supplemental record containing one volume of pleadings.

ted, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. CONST. amend. VI (2005).

(A) Except as provided in subparagraph (C), the term "controlled substance analogue means a substance—

(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II. 21 U.S.C. § 802(32).

STATEMENT OF THE CASE

Mr. James Turcotte was charged with violating the Controlled Substance Analogue Act, 21 U.S.C. § 802. The government alleged that Mr. Turcotte distributed gamma butyrolactone ("GBL") and 1,4-butanediol ("BD"), which it claimed were controlled substance analogues of the federally regulated substance gamma hydroxybutyric acid ("GHB").

As with any controlled substance, the government must prove that the defendant intended to possess and/or distribute the substance. (App. at 14a). But when dealing with sub-

stances under the Controlled Substance Analogue Act, which are not *per se* illegal, however, "knowledge of the substance's identity does not automatically imply knowledge of its status as a controlled substance." (App. at 15a). Thus, under the statute, before Mr. Turcotte could be convicted, the government had to prove beyond a reasonable doubt (and the jury had to decide) that the substance was a controlled substance analogue, *and that Mr. Turcotte was aware of that fact.* (App. at 18a).

At trial, Mr. Turcotte vigorously contested the issue of knowledge. He presented an array of evidence indicating he did not know that GBL was an analogue of GHB, including his own sworn testimony (Tr. 1396-99, 1407, 1413, 1421, 1444-45, 1449-51, 1459-60, 1470), testimony showing that when he first became aware of the products, they were sold openly in the marketplace (over the counter at a nutritional store, where most of the transactions were carried out by credit card), (Tr. 1384-85, 1393-94, 1413, 1420), testimony from experts that the substances were not, in fact, analogues of one another, (Tr. 1120-21, 1203) ("Q: Are they [BD and GHB] substantially similar? A: No. They are substantially dissimilar. When they are similar, things that are similar are in the same group; things that are dissimilar are in different groups. Q: How about GHB to GBL, same question. A: Same answer. Q: Are they substantially similar? A: No, they are substantially different . . . Q: You don't have an opinion whether GBL is an analogue of GHB? THE COURT: A chemical analogue. A: No, chemical analogues, they are not"), and testimony from prosecution witness Special Agent Ken Kulick, who testified that he did not think Mr. Turcotte was specifically "aware" that GBL was a controlled substance (Tr. 935-36) ("Q: And a lot of people were not aware of what the product was, including Jim [Turcotte], isn't that correct? A: Yes."). The Government, for its part, presented evidence that it believed demonstrated that Mr.

Turcotte was aware that the substance was an analogue of a controlled substance.

But the jury never reached the issue because it was not instructed on it. Over Mr. Turcotte's objection, the district court instructed the jury *not* to consider whether Mr. Turcotte had the requisite knowledge. Instead, the jury was instructed: "[I]t does not matter whether the defendant knew the substance was a controlled substance, only that it was a mixture containing GBL." (R. Doc. 105).

On appeal, the Seventh Circuit called this instruction on "scienter" "incomplete" and "highly misleading," and ultimately held that the instruction was given in error. (App. at 20a). The court's opinion confirmed that a conviction for controlled substance analogues requires that a defendant know that the substance was a controlled substance analogue; that is, he "must know that the substance at issue has a chemical structure substantially similar to that of a controlled substance, and he must either know that it has similar physiological effects or intend or represent that it has such effects." (App. at 18a).

The Seventh Circuit recognized that "well-established jurisprudence regarding the scienter requirements of controlled substance violations require that juries confront these questions of knowledge squarely." (App. at 19a). The court candidly admitted that in this case, "the jury did not confront this question directly below." (App. at 20a). In fact, "*the jury was specifically instructed to forego this determination*." (App. at 20a) (emphasis added). Because the jury never passed judgment on a contested element of the crime, the Seventh Circuit stated that this would "ordinarily . . . amount to reversible error," giving a jury the opportunity to address the knowledge issue. (App. at 20a).

Instead of reversing the conviction, however, the court determined the error was harmless. This conclusion was not

based, and could not be based, upon the Seventh Circuit's independent review of the evidence—because the record included an abundance of evidence that Mr. Turcotte *did not know* that the substance was an analogue, the court could not have found the instruction harmless. So instead of allowing the jury to weigh this evidence, the court effectively directed a verdict against Mr. Turcotte, at least on the intent element of the crime, by finding that Congressional pronouncements regarding GBL put Mr. Turcotte "on notice" of the illegality of the substance. There was no evidence that Mr. Turcotte had ever seen, read or heard of these pronouncements, and Mr. Turcotte testified he was unaware of the illegality of the substance.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION THAT OMISSION OF A CONTESTED ELEMENT OF AN OFFENSE CAN BE HARMLESS CONFLICTS WITH THE LAW OF AT LEAST THREE OTHER CIRCUITS.

The Seventh Circuit found that the omission from jury instructions of a contested element of the offense constituted harmless error. There is no question, as the Seventh Circuit acknowledged, that the Controlled Substance Analogue Act requires "a showing that the defendant knew the substance in question was a controlled substance analogue," and that the district court—with "incomplete" and "highly misleading" jury instructions—instructed the jury to "forego" making that determination. (App. at 18a, 20a). The Seventh Circuit found this error to be harmless. (App. at 20a).

The decision contradicts opinions of this Court and the law of at least three sister circuits. In *Neder v. United States*, this Court observed that "if," based upon an erroneous instruction, "the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—